

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
November 2, 2016 Session

**DONNA NANCE McLUCAS v. SHAWN MICHAEL NANCE**

**Appeal from the Circuit Court for Macon County  
No. 2015-CV-3 Clara W. Byrd, Judge**

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**No. M2016-00959-COA-R3-CV – Filed November 14, 2016**

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Defendant in an unlawful detainer action filed a counterclaim against the plaintiff. Two days later, the plaintiff filed a notice of voluntary nonsuit, but the certificate of service on the notice indicated it was placed in the mail the same day that the counterclaim was filed. Based on the notice of voluntary dismissal, the trial court entered an order dismissing the action without prejudice. Defendant appeals, arguing that he should be permitted to proceed with his counterclaim. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Shawn M. Nance, Westmoreland, Tennessee, appellant, pro se.

Bruce N. Oldham, Gallatin, Tennessee, for the appellee, Donna Nance McLucas.

## MEMORANDUM OPINION<sup>1</sup>

This case is before us on appeal for the second time. *See McLucas v. Nance*, No. M2015-00642-COA-R3-CV, 2015 WL 5936935 (Tenn. Ct. App. Oct. 12, 2015). Regrettably, the case involves a dispute between a mother and son.

The mother, Ms. McLucas, originally filed suit against her son, Mr. Nance, in general sessions court. *Id.* at \*1. Ms. McLucas alleged that Mr. Nance was “in breach of an oral month-to-month lease after receiving written notice to vacate the premises,” and she sought recovery of “unpaid rents in an amount to be proven at trial; damages to said property; insurance proceeds in the amount of \$5,918.67 paid to [Tenant] for a fire in the kitchen, but not applied towards said damages; immediate possession of said house; attorney’s fees and costs.” *Id.* Ms. McLucas obtained a default judgment, and Mr. Nance appealed to the Circuit Court for Macon County, Tennessee. *Id.*

The circuit court initially dismissed the appeal, finding that Mr. Nance had not posted a bond to stay the writ of possession. *Id.* On appeal to this Court, we reversed the dismissal, concluding that the bond, unlike a cost bond, was not jurisdictional. *Id.* at \*3.

After remand to the circuit court, Mr. Nance filed an answer and counterclaim on April 5, 2016. Two days later, Ms. McLucas filed a notice of voluntary nonsuit. But the certificate of service on the notice indicated it was served by placing a copy in the mail on April 5.

Based on the notice of voluntary nonsuit, the circuit court dismissed the action without prejudice. Mr. Nance timely appealed from the dismissal.

### ANALYSIS

Mr. Nance identifies three issues for appeal, but as we perceive it, his sole issue is whether the trial court properly dismissed the case without providing him with the opportunity to proceed with his counterclaim. For her part, Ms. McLucas asserts that

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<sup>1</sup> The rules of our Court provide as follows:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Mr. Nance's appeal is frivolous and requests an award of attorneys' fees.

Resolution of this appeal turns on two rules of the Tennessee Rules of Civil Procedure. Under Tennessee Rule of Civil Procedure 41, a plaintiff is generally free to voluntarily dismiss his or her case at any time before trial, but defendants may proceed with counterclaims filed prior to the service of the motion or notice of voluntary dismissal. Tenn. R. Civ. P. 41.01. Specifically, except in the case of certified class actions, derivative actions, and receiverships or when a motion for summary judgment filed by an adverse party is pending,

the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. *If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.*

*Id.* (emphasis added). Under Tennessee Rule of Civil Procedure 5, service may be accomplished by mailing a document to the person's last known address. *Id.* 5.02. "Service by mail is complete upon mailing." *Id.*

Under the unique facts of this case, we conclude that the trial court properly dismissed the case. The record is clear that Mr. Nance pleaded his counterclaim on April 5, 2016, but there is no evidence that the counterclaim was pleaded "prior to the service" of the notice of voluntary nonsuit. According to the certificate of service, the notice was placed in the mail to Mr. Nance's last known address on April 5, 2016, and under Tennessee Rule of Civil Procedure 5, service was complete on April 5, the same day the counterclaim was pleaded.

Although we affirm the dismissal, we decline to award Ms. McLucas attorneys' fees in defending this appeal. Under Tennessee Code Annotated § 27-1-122 (2000),<sup>2</sup> an

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<sup>2</sup> The statute provides as follows:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

appellate court may award damages, including attorneys' fees, against an appellant if an appeal is frivolous or taken solely for delay. The statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." *See Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977) (citing the predecessor to Tennessee Code Annotated § 27-1-122). A "frivolous" appeal is one that is devoid of merit, has little prospect of success, or is lacking in justiciable issues. *See id.*

We do not find this appeal frivolous or perceive that it was taken solely for delay. At oral argument, counsel for Ms. McLucas took the position that this was "a case of first impression." As he had vacated the premises that were the subject of the original detainer action, Mr. Nance gained nothing by pursuing an appeal of the voluntary dismissal by Ms. McLucas.

### CONCLUSION

We affirm the dismissal of this action without prejudice. We deny Ms. McLucas's request for attorneys' fees and costs incurred on appeal.

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W. NEAL MCBRAYER, JUDGE